IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

JOHN HAWKINS and HAWKLAW, P.A.,	)	
Plaintiffs,	)	Docket No. 3:21-cv-01319
vs.	)	Columbia, SC
	)	January 6, 2022
THE SOUTH CAROLINA COMMISSION ON LAWYER CONDUCT and THE SOUTH CAROLINA OFFICE OF DISCIPLINARY COUNSEL,	)	
Defendant.	)	

BEFORE THE HONORABLE J. MICHELLE CHILDS
UNITED STATES DISTRICT JUDGE, PRESIDING
MOTION HEARING

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THE COURT: I call to order Civil Action No. 3:21-cv-01319, John Hawkins and HawkLaw, PA vs. the South Carolina Commission on Lawyer Conduct and the South Carolina Office of Disciplinary Counsel. I have here representing plaintiff Robert Dodson -- and who else do you have with you?

MR. DODSON: Michael Virzi.

THE COURT: Thank you and welcome. And then for the Commission, Sarah Svedberg. Close enough?

MS. SVEDBERG: Yes.

THE COURT: Go ahead and say it.

MS. SVEDBERG: Thank you. Perfect.

THE COURT: And then Angus Macaulay and Brittany Clark. Okay. Welcome. Welcome. Okay.

So plaintiff has filed this action against these defendants challenging the constitutionality of the South Carolina Rules of Professional Conduct for attorneys and requesting declaratory and injunctive relief. And so we are here on defendant's motion to dismiss. And y'all can argue from counsel table or come to the podium, whichever is more comfortable. But we are ready to proceed.

MS. SVEDBERG: Thank you, Your Honor. If it's okay with you, may I approach the podium?

THE COURT: Yes. And you can take your mask off.

MS. SVEDBERG: May it please the Court. Thank you for the opportunity to appear before you today. On behalf of

the defendants, the South Carolina Commission on Lawyer Conduct and the South Carolina Office of Disciplinary Counsel, my colleagues and I are here today to ask that this Court grant the defendant's motion for judgment on the pleadings under Rule 12(c), and that this Court dismiss with prejudice the complaint filed by the plaintiffs, John Hawkins and HawkLaw, PA.

Your Honor, we've also moved in the alternative under Rule 12(b)(1), which I would address at the end.

THE COURT: Okay.

MS. SVEDBERG: It is the defendant's position, as set out fully in our briefing before this Court, that the plaintiffs' case must be dismissed on the strong policy grounds articulated by the U.S. Supreme Court in *Younger v. Harris*, and the Court must abstain.

Under *Younger*, a district court must abstain even if jurisdiction exists when there's an ongoing or pending state judicial proceeding that was instituted either before this federal court action or before substantial progress was made in the federal court action that implicates the important state interest and that provides the plaintiff with an adequate opportunity to raise the federal constitutional claims advanced here in the federal court action.

This abstention doctrine reflects a strong policy, according to the U.S. Supreme Court, against federal

intervention in state judicial proceedings in the absence of a great and imminent irreparable injury to the federal plaintiff. This same doctrine also recognizes that state courts are fully competent to hear and decide issues of federal law.

THE COURT: And which specific abstention doctrine are you relying on?

MS. SVEDBERG: Abstention under *Younger v. Harris*, Your Honor.

THE COURT: Okay. Thank you.

MS. SVEDBERG: Looking at this test under *Younger v. Harris* and based on the plaintiff's complaint treated as true for purposes of this Rule 12(c) motion, it is clear that abstention is warranted here. First, elements one and two of the *Younger* test are met because there's both an ongoing state judicial proceeding that was instituted before this federal action and that ongoing proceeding implicates a critical and important state interest.

THE COURT: When we have the ongoing state judicial judicial proceeding, which a lot of the LDC cases obviously go to the Supreme Court, is there any distinction on that part of the case going to the Supreme Court but then this Court keeping the issue with respect to the constitutionality of the --

MS. SVEDBERG: There's no state law or procedural

bar for any federal claims brought before the Commission and then going before the State Supreme Court then being petitioned to go to the U.S. Supreme Court. Same principles apply there. There's nothing that precludes the federal claims raised here from being raised in the state disciplinary proceedings. In fact, and I was going to address that in a little bit, there's a requirement under state rules that the South Carolina Supreme Court review the state disciplinary actions at issue here. And then, of course, there's always the opportunity for a petition for cert to the U.S. Supreme Court. Does that answer your question, Your Honor?

THE COURT: Yes.

MS. SVEDBERG: With your permission, Your Honor, I would like to address element two first for a variety of reasons. This is whether there's an important state interest here. We submit that South Carolina has an obvious and compelling interest in regulating both the practice of law and conducting disciplinary proceedings. While this is not necessarily disputed here by the opposing party, I needed to speak briefly about the state interest because of the rules and the proceedings in place. And I think, Your Honor, you just already asked me about that. So if you want me to, I can skip ahead.

THE COURT: That's okay. If you had anything else

to add on that argument, that's fine.

MS. SVEDBERG: No. I mainly wanted to add that under the State Constitution, the South Carolina Supreme Court has jurisdiction to both regulate the admission of the practice to law and the disciplinary actions that are at issue in the underlying proceedings. And the fact is that the U.S. Supreme Court pursuant to that authority has adopted the Rules of Professional Conduct which are modeled after the ABA model rules, which are the ones that subject lawyers to discipline based on ethics violations. And I will submit that here, Your Honor, those Rules of Professional Conduct are the ones that are being challenged.

Also I wanted to add that the lawyer discipline that is under the jurisdiction of the U.S. -- or the State Supreme Court, I'm sorry, is administered through the Commission on Lawyer Conduct and the South Carolina Office of Disciplinary Counsel. And those are the defendants here today.

The Commission was created by the Rule 4013 of the South Carolina appellate court rules. And it consists of 34 members of the Bar in South Carolina and 16 members of the public. And their panels are made up of not just lawyers but also members of the public at all times.

The Supreme Court appoints a member of the state bar to become the disciplinary counsel whose office is responsible for both screening -- or receiving the complaints

of ethics violations by lawyers in the state, screening them and investigating them. And if formal charges are brought, the ODC is responsible for prosecuting them as well.

With respect to the Commission, our other client, they are responsible for also investigating in panel format and also hearing all complaints before it goes to the State Supreme Court.

THE COURT: The Supreme Court takes this up in the original jurisdiction, these complaints? So, in other words, these don't circulate at the circuit level and then go to the Court of Appeals, they go directly to the Supreme Court?

MS. SVEDBERG: No. So under Rule 413, once the Commission -- if after receiving screening and investigating, they determine that the formal charges should be filed and then -- which triggers then further investigations and a hearing before the Commission, all transcripts and the report of recommendations, whether it's recommendations for sanctions, recommendations to dismiss, all of that goes straight from the Commission to the State Supreme Court for review. And the State Supreme Court decides -- the State Supreme Court can decide to adopt the recommendations by the Commission, they can modify the recommendations, or they can dismiss them.

And to your point, Your Honor, in terms of whether this goes then from the State Supreme Court to the U.S.

Supreme Court, there are cases in the past where there can be disagreement along the way. You know, the Commission can decide to dismiss or the Commission can decide to send a recommendation for sanctions or some other issue to the State Supreme Court.

And we have cases in the past In re Primus, *In re Primus* is one of them, where the State Supreme Court agreed with the Commission to impose sanctions on a lawyer. And the lawyer petitioned for cert to the U.S. Supreme Court, and the U.S. Supreme Court rejected it, reversed and remanded it. So this is a well-established process of judicial review post-disciplinary proceedings before the ODC and the Commission.

With that as a backdrop, Your Honor, I would like to turn back to the first requirement under *Younger v. Harris*, and that is that there needs to be an ongoing or pending state judicial proceeding. Here it is clear and really undisputed that there is an ongoing state disciplinary proceeding triggering abstention of *Younger*. For purposes of the U.S. Supreme Court that has articulated the standards for this abstention, a proceeding should be regarded, and I'm quoting, as ongoing for the purposes of *Younger* abstention until state appellate review is completed.

Closer to home in a case before another judge in this district, in *Bieber v. South Carolina Commission on*

Lawyer Conduct, the district court stated, and I quote as he was dismissing a similar case on abstention grounds, and I quote, disciplinary proceedings begin with screening followed by a preliminary investigation, full investigation, filing of formal charges, discovery hearing, and a review by the South Carolina Supreme Court.

Here Mr. Hawkins is an attorney licensed in South Carolina. Investigations of complaints received by the ODC culminated with formal charges filed against Mr. Hawkins on April 20th, 2021. The complaints were about TV ads that had been aired by Mr. Hawkins over some time. As such, the formal allegations or the formal charges alleged violations of Section Rule 7.1 which regulates communications about lawyer services and Rule 7.2, which regulates lawyer advertising.

At the time, rather than responding to the formal charges, according to the state proceedings, at that time the lawyer who is subject to the formal charges has 30 days to respond to the formal charges. For various procedural reasons, rather than to respond to the formal charges at that time, plaintiffs brought this lawsuit on May 4th. So with that said, we had an ongoing state proceeding at the time that this federal case was brought.

In this complaint here, Your Honor, plaintiffs also allege that sections -- well, plaintiffs allege that sections

of the rules implicated by the disciplinary proceedings were unconstitutional on their face and as applied to the plaintiffs. The plaintiffs, as you noted at the beginning of this hearing, plaintiffs have asked this Court for both declaratory and injunctive relief.

After the defendants filed the motion to dismiss on October 11th, which is currently before the Court, plaintiffs, or Mr. Hawkins, responded to the formal charges in the disciplinary proceeding. And the Commission received it on November 11th, 2021.

Before I move on, I wanted to just note that so according to the underlying proceedings, the state disciplinary proceedings, at this time, with the formal charges having been filed, a response filed by Mr. Hawkins, the next step is a hearing before the Commission. And it is set to be held at some point this spring, I believe March of 2022. And after that, according to the rules, once the transcripts are compiled and the hearing is done and the report is made by the Commission, it goes before the State Supreme Court.

So for all of these reasons, I would say, before I move on to step three to the *Younger* abstention doctrine, I would say that Elements 1 and 2 have been met, both in ongoing state judicial proceeding and there's an important state interest implicated.

With respect to the third requirement under *Younger v. Harris*, defendants submit that the Commission and the South Carolina Supreme Court provide an adequate opportunity for the federal constitutional claims raised here to be applied or raised.

The U.S. Supreme Court, and I want to quote some of the language from the U.S. Supreme Court on this issue, in the *Younger* abstention context, the federal court should not exert jurisdiction if the plaintiffs had an opportunity, I'm quoting, had an opportunity to present their federal claims in the state proceedings. The pertinent issue, the Court said, is whether plaintiff's constitutional claims could have raised -- been raised in the pending state proceedings.

In the *Bieber* case in this district the district court recognized that stating nothing in the disciplinary rules bars plaintiff from raising his First Amendment challenges to hold that the state proceedings are inadequate for resolving federal claims would erode the well-established presumption that state courts will safeguard federal constitutional rights.

Here I also want to note, Your Honor, that it is the plaintiffs' burden to show under *Younger* that there's no adequate opportunity to raise the federal claims asserted here in the state proceeding. There has been no such showing, I submit, and cannot be. For one, as I noted

already, Rule 413 requires judicial review of the ongoing state disciplinary matter. Second, nothing in the state's procedural laws prevents presenting federal claims in the state forum.

And to that point, Your Honor, Mr. Hawkins has already asserted constitutional challenges in his response to the formal charges in the underlying state disciplinary proceedings. Like in the complaint before this Court, Mr. Hawkins makes both facial and as-applied challenges to portions of Rule 7.1 and 7.2. And as I noted, the claims in the disciplinary proceedings are rapidly moving towards a hearing and ultimate review by the State Supreme Court.

THE COURT: Does any -- you said that's coming up in May?

MS. SVEDBERG: The last we heard from our clients is that in March or April --

THE COURT: March or April?

MS. SVEDBERG: -- there will be further proceedings in the disciplinary action.

THE COURT: Okay.

MS. SVEDBERG: I think that they are fairly booked. So they are trying to plug in hearing times for the Commission as soon as possible. And I believe that's as soon as as March or April 2022.

THE COURT: How do the proceedings themselves affect

this case at all other than the fact that they are occurring?

MS. SVEDBERG: Well, that is our point of being here. We would say that having these proceedings go on at the same time as the underlying proceedings --

THE COURT: I understand that. But there's no outcome of the proceedings that affects this case. It's just the abstention doctrine argument with respect to the proceedings?

MS. SVEDBERG: Yes, Your Honor.

THE COURT: Okay.

MS. SVEDBERG: There's no procedural effect, Your Honor, you are right.

If all three elements of *Younger v. Harris* abstention have been met, as we submit they have been here, a district court must abstain unless there are narrow exceptions. Those narrow exceptions is a showing by the plaintiffs that there has been bad faith, harassment, or some other extraordinary circumstance. It is clear that *Younger v. Harris* and cases that came after it state that the exception is considered to be narrow and should be used sparingly. Here, looking at the allegations of the complaint, it shows beyond any doubt, the defendants submit, that this is not a case for the application of such a narrow exception.

The closest plaintiffs get in their complaint is

that they allege that the rules have been interpreted in an arbitrary and capricious manner that have led defendants to selectively enforce the rules against plaintiffs. We submit that such an allegation, conclusory allegation, does not rise to the level of bad faith or harassment. I will mention too, Your Honor, that some of the other extraordinary circumstances have been found to be if a rule or a statute challenged is flagrantly and patently unconstitutional with respect to every word, every clause, and every sentence, according to the U.S. Supreme Court. So this is a high bar.

Here, I would say the opposite is true. The procedural posture of this underlying state disciplinary proceeding as well as our actions here show that there has been nothing but good faith on behalf of the defendants. In fact, throughout the months since this federal action was filed, in an effort to work towards resolutions, one of the portions of the formal charges was dismissed with prejudice. These are all authorized under the state rules for the ODC to try to work out a resolution with a lawyer who is subject to the discipline or the subject to the charges or the investigation. And so as to avoid triggering the hearing before the Commission, the ODC requested and the ODC for a time granted the formal charges to be withdrawn without prejudice, just for a time, so that the parties could have an opportunity to resolve the case without it becoming a hearing

before the Commission triggering a resolution by the State Supreme Court.

When it was clear that there was no resolution to be had, those formal charges were reinstated, coinciding with motion to dismiss and ultimate response by Mr. Hawkins in the underlying proceedings.

I also would submit the fact there has been no delay, the fact that the defendants have moved rapidly to try to bring to a resolution the state disciplinary matter is another factor that shows that there's no bad faith, in fact, good faith in the underlying proceedings. For that reason I would say that there's no exception that applies. And we submit that the *Younger v. Harris* abstention applies here, and the case must be dismissed with prejudice.

If I may, before I conclude, there are some questions that I anticipate might arise based on the response by the plaintiffs and some other arguments made before this Court, and if I may, I might address those here to perhaps answer some questions.

THE COURT: Okay.

MS. SVEDBERG: In the response to the motion to dismiss, the plaintiffs suggest that *Younger* does not apply to HawkLaw, PA. They say that for purposes of HawkLaw, PA, there's no ongoing state judicial proceeding because the judicial proceedings or the formal charges are levied against

Mr. Hawkins. I wanted to submit to the Court that that's not an accurate conclusion based on the law and on the facts of this case. To the contrary, there's actually a long line of cases that say that when a nonparty, like HawkLaw, PA, to the state proceedings, does, in fact, fall under the abstention doctrine when their claims are entirely derivative of the claims brought by the party before the state proceedings.

Other terms used by not just courts in this district but throughout the jurisdictions have been if there's a close nexus between the nonparty and the party to the state proceedings or if their rights and claims are inextricably intertwined. In fact, most of the cases, Your Honor, that have been decided have been parties that are much father apart and they still have come down on *Younger* abstention applying.

Here we have Mr. Hawkins who is the lawyer in HawkLaw, PA, ownership, finances, everything is combined, although we do know that, of course, HawkLaw, PA is an organization existing independent of Mr. Hawkins, they are so close in nexus, they are inextricably intertwined. And HawkLaw, PA indisputably is raising claims that are entirely derivative of the claims brought before Mr. Hawkins.

And I will note too, Your Honor, that if we look at the complaint brought by the plaintiffs here, taking as true for the purpose of this motion, in that complaint, it says

that plaintiffs, plural, are being investigated, are subject to this discipline of the formal charges in the underlying proceedings.

I would also like to mention that the plaintiffs suggest that *Younger* abstention is inapplicable to the portion of Rule 7.1 that was dismissed with prejudice in the state disciplinary proceedings. The defendants submit that's not an accurate statement of the test under *Younger*. There's nothing in the case law following -- there's nothing in *Younger* and nothing in the case law following *Younger* that states or that claims that the federal constitutional claims should be parsed that way. It has the three tests. Is there an ongoing state proceeding? Was there an adequate opportunity for those federal constitutional claims to have been raised there? And we submit that there was.

Finally, Your Honor, I would be remiss if I did not mention and correct some statements made during the December 9th telephonic hearing before the Court. In that hearing, when asked -- when both sides were asked the grounds for -- briefly asked the grounds for why this case should be or should not be before this Court, and opposing parties suggested that the reason this case should not be before this Court is because of the bias of the State Supreme Court. I'm paraphrasing here, although I do have the transcript.

I would say that basically the argument was that

because the State Supreme Court implements the rules that are at issue. They cannot rule on the constitutionality of it. And I am constrained to submit to the Court that there is no such bias. And also allegations of bias without any proof should be rejected. And I would also note that it's well-established that there's a presumption of honesty and integrity of the judiciary. And to suggest that there's an inability of the Court to adjudicate is a very high bar. And that is not present here, Your Honor.

I also would note that as I'm sure the Court is aware, Rules of Professional Conduct are implemented and amended over the course of many years. The makeup of the court changes. And also, so if we bring it to its logical conclusion, we don't know who necessarily drafted or implemented something way back versus who is looking at it now in terms of the justices of the State Supreme Court. I don't think that's a necessary analysis because I think that we can assume here that the State Supreme Court is perfectly capable to adjudicate the constitutionality of claims, of rules under here.

I would like to conclude that the defendants contend that all of the elements of a *Younger* abstention test have been met. We would like for this Court to dismiss this case with prejudice and allow the administrative proceedings and their judicial review contemplated by the State Supreme Court

and their rules implemented thereunder to proceed without interference.

THE COURT: Just a couple of questions. You argued that plaintiffs do not have standing to challenge the rule of professional conduct 7.1E because the related disciplinary procedures have been dismissed with prejudice.

MS. SVEDBERG: Right.

THE COURT: Do you still stand by that? Because their injury is not the actual discipline based on the rules but the threat of discipline resulted in chilled speech.

MS. SVEDBERG: Okay. So I'm going to try to answer the question. So the abstention analysis operates independent of a standing analysis. If we look at standing, the same principles of standing apply in this court and in an underlying court.

Here, if I jump to and just address briefly the fact that we have also moved to dismiss alternatively under Rule 12(b)(1) because certain portions before this Court lack standing, we would say that -- well, for one, we would argue that Rule 7.1E, Mr. Hawkins or HawkLaw, PA do not have standing as applied as a third-party facial-- we would -- because for one, that has been dismissed with prejudice; second, we would suggest that the plaintiffs here when arguing -- which is their burden to prove -- when they argue standing, they have not argued that there's an overbreadth of

the rules. They have argued chill.

So, Your Honor, I would submit when it comes to Rule 7.1E, there's probably -- basically every lawyer in this room suffer from more of a chill than Mr. Hawkins and his law firm, because the actual tradenames at issue for Mr. Hawkins and HawkLaw, PA have been dismissed by prejudice. It's not likely that those are going to come up again.

THE COURT: Okay.

MS. SVEDBERG: And the 7.1E, Your Honor, is trade name moniker, issues of tradenames and whether they impermissibly imply an ability to obtain results.

THE COURT: Okay. Thank you.

MS. SVEDBERG: Your Honor, unless you have any other questions --

THE COURT: I don't.

MS. SVEDBERG: -- I'm going to yield the floor. I submit --

THE COURT: And you will have a chance to reply to them too.

MS. SVEDBERG: Thank you, Your Honor.

THE COURT: All right.

MR. DODSON: Your Honor, if I may, I would like to use the same podium, because I agree with my colleague, I kind of like the way that this is kind of tilted back a little bit. As I get older, I can't see. So this is going

to help me see my notes.

Your Honor, before addressing the specific arguments on abstention and standing, I would like to point out an overriding flaw in defendant's arguments here. And it's this, their arguments set up this impermissible Catch-22 that is really contrary to well-established be case law. It's contrary to common sense, and it's really contrary to just general motions of fair play.

The Catch-22 is essentially a heads we win/tails you lose proposition. And this is why. The heads we win is if we wait and we file our federal action, our federal complaint, after there's an investigation or after there are formal charges filed, then they say this case has to be dismissed on *Younger* abstention grounds. The tails we lose proposition is on the standing, because if we wait and if we file our action before there are formal charges, or if our complaint comes after the charges are all resolved, the investigations are all resolved, then they say and they argue and they wrote to the Court, there's not an injury in fact, there's not a case in controversy, so you don't have standing.

And then they go a step farther. I didn't hear it here this morning. But then they say, well, in the alternative, the Court should just not hear the whole case all together, just make a discretionary ruling that you are

not going to hear the case, Your Honor. So there's essentially this impenetrable maze that they've tried to create here.

And as I will demonstrate in a moment, both the defendants' arguments are flawed and wrong because the limited abstention exception to general jurisdiction does not apply here. And the plaintiffs clearly have standing to bring this action. And I would like to actually begin my arguments and spending a few minutes on the standing issues directly.

At the outset, let me note just how implausible their argument on standing is to begin with. Because their argument boils down to a couple of things. It boils down to a lawyer and his law firm don't have standing under the First Amendment to bring challenges to the Bar's rules on what would otherwise be protected commercial speech.

And then going along with that, they make the very implausible argument that once those rules are actually enforced against the same lawyer and law firm, that he doesn't have standing to make as-applied challenges. And so I would direct the Court to the defendant's own brief on this. Because in their brief, they don't cite one case to this Court. There are a bunch of lawyer advertising cases out there that have gone all the way to the Supreme Court. And these same standing arguments have been made time and

time again. And they don't cite this Court with a single case where these standing arguments that they made in their briefs and that they argued here this morning were accepted.

Now take a look at our brief. We cited this Court with multiple examples both from different circuit courts --

THE COURT: Just to stop you there for a second. I don't hear the defendants really pushing a standing argument. I hear them pushing abstention.

MR. DODSON: If they are abandoning their standing argument, I will jump straight into the abstention. But I thought I heard them saying they were essentially going back to the --

THE COURT: I think kind of more in response to my question about the standing, but I think their true argument is on abstention. Obviously, I will have to make a standing finding, but I think their issue is abstention.

MR. DODSON: Yes, Your Honor. Let me move on then. Thank you.

Turning to the abstention doctrine, the abstention doctrine is a very narrow exception to federal court jurisdiction. To quote from the Supreme Court, our dominant instruction is that even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the exception, not the rule. That comes out of the Sprint Communication case that I cited multiple times

in our brief. The Sprint court went further. Abstention is not in order assembly because a pending state-court proceeding involves the same subject matter. Direct quote from the Supreme Court.

Well, that's exactly what you have now. You have a state-court proceeding involving a similar subject matter. But Sprint teaches that does not mean abstention necessarily applies. And it doesn't apply here because a number of the majority of plaintiff's complaint in this action is not subject to the state-court proceeding. Let me start with HawkLaw, PA. HawkLaw, PA is not a party to the state-court proceeding. It has never been a party to the state-court proceeding.

By the very nature of the abstention doctrine, that being that a federal court should not interfere in pending state-court matter. The doctrine simply cannot apply because there is not and never has been an action against HawkLaw, PA in the state-court system. To be clear, all of HawkLaw's claims fall squarely outside this *Younger* abstention exception to jurisdiction.

Abstention could not apply to other parts of plaintiff's complaint relating to John Hawkins individually for the same reason. Parts of his individual claims fall outside the state-court proceedings. In other words, there is not a state-court proceedings.

So let me start with the phrase "expect more." Back in 2014, there was an anonymous complaint to the Bar saying John Hawkins is violating the Rules of Professional Conduct by using the phrase "expect more." That was concluded in 2015 or '16 with a letter of caution, a letter of caution being exactly what it sounds like: Do it again, you are cautioned, you are warned, do it again and you are in trouble. That ended the proceedings.

Now, with that case, there weren't even formal charges. There was simply the investigation. And under the rules, ODC can simply issue a letter of caution without having to go through the Commission of Lawyer Conduct, which is exactly what happened here. And I think under that, those circumstances, the Supreme Court on a letter of caution like that doesn't even review anything. All of that is not real important here today.

What's important here today is this. That matter was resolved. That matter was concluded. But John Hawkins and HawkLaw, PA are not using that phrase "expect more" anymore in their advertising because of that letter of caution. That falls outside the *Younger* abstention doctrine.

Your Honor, a similar thing is true as to the facial challenges in Rule 7.1E, E as in echo, which is the nickname or moniker rule. All of the charges against John Hawkins were dismissed. Those formal charges are done. So that part

of the complaint is simply untouched by the abstention doctrine.

Now, all of the facial challenges are untouched -- the other facial challenges, because there were two other rules that we made challenges to, there was Rule 7.1C, Charlie, and 7.2A, apple, that we challenged too. Those facial challenges, where we have said those rules on their face are unconstitutional, those challenges also don't fall under the abstention doctrine. And there's really kind of two reasons for this. One is a procedural reason and the other is a more substantive reason.

The procedural reason is this. ODC and the Commission on Lawyer Conduct -- ODC is the entity that brings the formal charges and said you've done wrong and we are prosecuting you. They are essentially the prosecutor's office. The Commission on Lawyer Conduct is essentially the trial court. The Commission on Lawyer Conduct under the rules that created it -- don't take my word for it. It's the South Carolina appellate rules 413. But under those rules, the Commission on Lawyer Conduct is not vested with the power or authority to make declarations that the Rules of Professional Conduct are unconstitutional. It simply can't do that under the rules that the South Carolina Supreme Court wrote and drafted to implement the Rules of Professional Conduct. And when you think about it, how could it? Because

as defense counsel has pointed out, ultimately, decisions that come out of the Commission on Lawyer Conduct go directly to the South Carolina Supreme Court. And it's the South Carolina Supreme Court that drafted these three rules that we've challenged. And, obviously, the South Carolina Supreme Court can't be the arbitrator regarding the constitutionality of the very rules that it drafted.

And this leads me kind of directly back into the Spirit Communications case and the Fourth Circuit law. We know from the *Nivens v. Gilchrist* Fourth Circuit case that for abstention to apply, there has to be -- and I'm quoting -- ongoing state judicial proceeding that provides an adequate opportunity to raise constitutional challenges. And we know from the teachings in the Sprint case that these are additional factors the Court should consider in these abstention argument motions.

But here, what defense counsel is asking you to do is to decline jurisdiction and allow the South Carolina Supreme Court to be the final arbiter on the constitutionality of the very rules that it drafted, wrote and implemented. And it's not a matter of bias. It's not a matter of me thinking that the numbers of the Supreme Court have some sort of nefarious purpose. It's a simple principle. Our Supreme Court would have never passed rules to begin with that it thought were unconstitutional. And

maybe Your Honor hears those claims. And maybe Your Honor agrees that I'm wrong and they are right and the rules on their face are constitutional. That may well be. God knows, in my 23 years of practicing law, I've had so many judges tell me I'm wrong on the merits of my argument, that you may come to that conclusion too. But that's my point, Your Honor, is that there ought to be an independent review of this.

And I want to address the arguments that were raised in the brief here this morning and that were -- or were raised in the briefs and then addressed here -- that if we don't like what the South Carolina Supreme Court does with it, well, we can just appeal that to the U.S. Supreme Court. We can just petition for certiori to the U.S. Supreme Court. And I am not going to make any bones about it. That argument is weak, it's hollow, and it is meritless. And this is why. Because less than 1 percent of petitions for writ of certiori to the Supreme Court are actually granted and heard. That is not meaningful judicial review. That is putting your law license on the line on a wing and a prayer that your petition for writ of certiori will be heard.

And I also want to clarify something else. Certainly, the South Carolina Supreme Court can hear as-applied challenges. They have done that before. Defense counsel is quite correct when they point to cases where the

South Carolina Supreme Court has said -- you know, essentially ruled against ODC, Office of Disciplinary Counsel, and said, no, we are not going to do this because there are First Amendment constitutional issues here. But those have all been not on facial challenges, but on as-applied challenges.

And what I've been going on here about for several minutes now isn't necessarily the as-applied but the facial challenges that we have made to Rule 7.1C, 7.1E and 7.2A. So when you follow the holdings of the *Sprint* court, the only parts of the complaint that could possibly be touched by this abstention doctrine are the as-applied challenges where there are two pending charges over at the Commission on Lawyer Conduct that we do expect will be heard in the spring. Let's just call it April-ish because maybe it's May. You know how that goes. So we will just call it April-ish. But those are the only parts that could possibly fall under this abstention doctrine.

But the reasons that this Court shouldn't dismiss those claims is this. In essence, the defendants have stalled and delayed in bringing this motion to the Court. Because there is appellate case law that I cited in my brief, including U.S. Supreme Court case law, that holds once this case, once this federal action goes beyond its embryonic stage, abstention is no longer appropriate. And that

embryonic stage language is straight from the U.S. Supreme Court's case *Doran v. Salem Inn*, which I cited in my brief.

And it was the defendants that let this case go beyond its embryonic stage. I mean, they litigated this case. They participated in crafting a discovery plan. They asked the Court to modify and change the original scheduling order. They asked and answered discovery. They filed and responded to motions to compel. And, really, that's exactly -- that's exactly why we are here today, because they don't like the way I litigate. And when I pushed them -- from day one on this case, I have been asking them for that Law Tigers secret settlement from the *Kirkendall* case that was before Your Honor a few years ago. And recognizing you didn't have a lot of involvement. It was kind of filed. It was settled under secret terms, or we believe it was settled under secret terms with no court intervention at all. And when I started saying, you, governmental agency, give me the secret settlement that allows a truck to be driving around with a car wrap with a big tiger that says Law Tigers on it that has a South Carolina tag on it and is garaged up in northeast Columbia, and I want the secret settlement, because if you are going to tell me that John Hawkins can't use the hawk, John Hawkins can't have hawk screeches on his ads, John Hawkins can't have paid actors flapping their wings like a hawk, then I want the secret settlement that would

purportedly show why an outside law firm can have tigers plastered all over it in sort of the name image and likeness of tigers.

And in response to that motion to compel, this pending motion was what was filed. They didn't even respond to the motion to compel until several months after I filed it or, well, a couple -- several months -- several weeks, it wasn't several months. That's an overstatement. They just filed this motion to dismiss. What they are doing, Your Honor, is they are venue shopping.

They were more than happy to be in this court to begin with because when we filed the initial action, I reached out to defense counsel and I said, I'm likely to file a motion for preliminary injunction, why don't you just stay the proceedings in the state court action, let's resolve this federal court action first, and then we can go back and litigate all of that. They agreed to that. They actually filed -- we filed documents over at the Commission on Lawyer Conduct that dismissed without prejudice all of the formal charges and proceeded with litigating this case.

But then I started turning the heat up in the kitchen on the Law Tigers and other discovery issues. And that's when the current motion to dismiss got filed. So our argument is that they are the ones responsible for this case going beyond its embryonic stages of development and using

this motion to dismiss essentially as a venue in forum shopping matter.

THE COURT: Let me do this. I've got a call with a judge. So let's just take about a 10- to 15-minute break and then we will come back.

MR. DODSON: Thank you, Your Honor.

(Whereupon, recess transpired.)

THE COURT: You can continue.

MR. DODSON: Thank you, Your Honor. I brought Mr. Virzi. He was supposed to bring a hook with him, but the marshals wouldn't let him in with the hook to pull me back.

THE COURT: Okay. That's fine.

MR. DODSON: He told me when we met that I needed to be brief.

THE COURT: No. No. No. It was okay. Every once in a while, you got an appointment of some sort. And I didn't want to mess up someone's schedule. So I took a call real quick.

MR. DODSON: I only have four very quick points to make. One I wanted to correct something that I said before, because when I was talking about staying the state court action, I think I incorrectly kind of described how that came about. How it came about is I indicated that I was going to move for a preliminary injunction and would they consent to the preliminary injunction. And the response was

essentially, no, you need to go to the state court action, and if you move to have that stayed in the state court action, we won't oppose that. So that's what we did. It wasn't -- and they did consent to the stay in the state court action. And the charges in the state court action were dismissed without prejudice. Just to clarify, because I don't want to be accused of misrepresenting anything to the Court on how that transpired.

THE COURT: Sure.

MR. DODSON: Another point that I wanted to make was this, because I told you earlier, there were sort of two components to this argument that the facial challenges shouldn't be dismissed. There was the procedural and then there was the substantive. And I don't know that I was as clear as I would like to be on that. So I wanted to clarify that.

THE COURT: Okay.

MR. DODSON: It is procedurally impossible for the Commission on Lawyer Conduct to invalidate rules facially. Just that's not in the rules.

But, second, even if that were procedurally possible, that goes to the South Carolina Supreme Court. And this is where I get into the substantive part of it. The law is that that has to provide an adequate opportunity to raise constitutional challenges. And my position on that, just to

be clear, is that that has to mean more than you can petition the U.S. Supreme Court for a writ of certiorari that probably won't be granted. That language is important language in that case law. And my position is that means that a federal court should decide issues of federal constitutional law, not just hear those in its discretion, which is what essentially you are doing when you petition the U.S. Supreme Court for certiorari.

The third thing I wanted to do is, they, in their brief and then again here today, they've talked fairly extensively about this unpublished district court opinion from several years ago. I think it was *Bieber*. It's in their brief. They pound on that drum pretty hard in their brief and here today. There's really three primary reasons that case is different than what is before you now. First, you know, you can see this from the filings, there were no facial challenges to the rules themselves in that case, none. It was only as-applied challenges. And that's an important distinction for the reasons that we've discussed today.

Another distinction is this. That case was decided pre-*Sprint* case, which was the *Sprint* case was decided by the U.S. Supreme Court in 2013. And the reason that that's important is that *Sprint* case really pretty fundamentally challenged the landscapes with the breadth and scope of this *Younger* abstention. You know, when you read kind of all

these cases, you read *Younger* and then you read the *Middlesex* case, and you read sort of these lines of cases, what really happened is you sort of started to see circuit courts and district courts pushing and pulling and kind of expanding the use of this *Younger* abstention.

And then in 1989, the Supreme Court, you know, issued an opinion in New Orleans. I think it was New Orleans Public Service, Inc. And they had some pretty strong language in that 1999 case. But it's like that language kind of didn't get picked up a whole a lot by the circuit courts and district courts.

So then in 2013, when the *Sprint* case came out, I mean, they used really strong language in that *Sprint* case that I quoted some of that language, sort of tightening up and reining in the overuse of this *Young* abstention doctrine. So that district court case -- I think it was Judge Herlong's case, but I maybe mistaken on that -- that was pre-*Sprint*. So that's sort of the second distinguishing factor.

And the third is this, if you look at the filings in that case, right out of the gate in that case, the defendants filed a motion to dismiss. There was no discovery. There was no this. It was in response to the complaint they filed a motion to dismiss. And there wasn't -- the case had not gone beyond any embryonic stage in develop. There hadn't been participation in discovery and all that there has here.

And then the final sort of -- the final point that I will make here, and then I will shut my pie hole and sit down, is this, if you do dismiss the parts of the case that deal where the Commission on Lawyer Conduct was hearing that part of the complaint, which is those two formal charges, because that's really, I think, what we are talking about here today, if you do dismiss those two -- and we don't think you should, but if you do, any dismissal should be without prejudice, because the Court wouldn't have reached the merits of the case. It shouldn't be with prejudice. And I think that's a pretty obvious point to make.

Thank you, Your Honor. Unless you have any questions, I will sit down now. Thank you for your time this morning.

THE COURT: Thank you very much. Okay. Reply?

MS. SVEDBERG: May I offer a brief reply, please. Let me get my ducks in a row here for a second. Thank you.

Your Honor, I think that we have addressed some of the issues raised by opposing parties in our brief.

THE COURT: Sure.

MS. SVEDBERG: I wanted to make a few points. It seems that they insist on conflating the standing and abstention doctrine principles. And I think we set that out in the brief.

And also, in terms of the argument that state

judiciaries should not be allowed to hear federal law challenges, just stands the whole principle of federalism and comity on its head. And I submit that that is not something that should happen.

Specifically, I have to point out that the *Sprint Communications* case does not stand for the proposition that *Younger* abstention is a narrow exception to jurisdiction. *Sprint Communications* and the discussion therein -- and I'm sure that the Court already has cites to this, but I'm happy to provide it. *Sprint Communications* stands for the proposition that there are certain state-court proceedings, certain categories of state-court proceedings that are not appropriate for *Younger* abstention. It does not stand for the proposition that within the categories of state-court proceedings that fall within that *Younger* abstention doctrine, that there should be a narrow use of that abstention.

If we look at what -- how the case law evolved and how the doctrine evolved, it started with criminal proceedings. And then the U.S. Supreme Court has stated that there are certain state-court proceedings other than criminal proceedings, civil proceedings, that are coercive, judicial in nature, so as to extend the *Younger* abstention to such. It is absolutely undisputed that legal disciplinary actions fall under the *Younger* abstention. That is not in question

here. So it is an incorrect argument to submit that *Sprint Communications* somehow or another reins in the application of this extension.

Sprint does not fall under *Younger* because it was a rate-making issue. It was whether charges -- interstate charges for telecommunication company and the regulation thereof was a type of civil state proceeding that would fall under these categories that had evolved from *Younger v. Harris*.

So in that regard, any argument or any suggestions that *Sprint*, as opposing party has suggested here today and in the brief, somehow or the other reins this in is inaccurate. In fact, a quote from another case that opposing party has cited *Doran v. Salem Inn*, we hold the principle underlying *Younger* is that state courts are fully competent to adjudicate constitutional claims. And, therefore, a federal court should in all but the most exceptional circumstances refuse to interfere with an ongoing state criminal proceeding. As we know, it has since evolved to include other proceedings.

In the absence of such proceeding, however, we recognize plaintiff may challenge -- in the absence of such proceeding, of course, a plaintiff may challenge it here.

There are a few more things to unpack. Opposing party makes the argument that HawkLaw, PA is not subject to

the ongoing state proceedings. Again, I have submitted that there's a whole line of cases that submit that when a nonparty to the state proceedings claims are entirely derivative of the state party, then *Younger* abstention applies equally.

And I have a citation, if you want it. I also made some copies. I have one case from the 6th Circuit Court of Appeals. And the reason I bring that one up is because it actually has a really instructive discussion.

THE COURT: Just go ahead and cite it into the record.

MS. SVEDBERG: Yes, Your Honor. It's *Citizens for Strong Ohio v. Marsh*, 123 Federal Apx, 630. And that's from 2005. And I'm happy to hand one up.

THE COURT: Sure. That's fine.

MS. SVEDBERG: There's also cases in this district that have addressed the exact same issue, where they haven't used necessarily the entirely derivative language, but close nexus.

In terms of the argument that expect more, again, I submit that I believe the opposing party is somehow or the other conflating the standing principles with the abstention principles. The fact that nothing has occurred and they expect more advertisement mentioned is really irrelevant here, because the rule implicated by that is Rule 7.1C. And

in fact, Rule 7.1C is implicated in the formal charges. And to that point, in the response -- and I have to note, Your Honor, that 30 days, under the rules, state rules, 30 days after either a response has been filed to the formal charges or the deadline -- 30 days after the deadline to accept a response, these matters become public record. So I would like perhaps for the Court to take judicial notice of that.

In the response to the formal charges -- this addresses a lot of points made by opposing party -- Mr. Hawkins makes both as-applied and facial challenges to sections of Rule 7.1 and 7.2. And also, sort of along the lines of the argument with respect to *Sprint Telecommunication* being a case outside of this, their argument that somehow or the other facial challenges cannot be brought before the state judiciary are just not right. They are not correct.

It might be that in certain administrative proceedings, whether it's the Public Service Commission or other rate-making authorities in this state and other states, where there might not be procedural rules or other to allow for certain constitutional challenges. That's just not the case here. It is absolutely clear that Mr. Hawkins can make both applied and facial challenges. And he has. And those will be subject to review by the State Supreme Court, by their state rules they are required. And, of course, that

can also be petitioned to the U.S. Supreme Court.

I also will submit in that regard that the fact that the ODC or the Commission cannot on their own overturn or deem unconstitutional a state rule, that is not the test under *Younger*. Adequate opportunity means there is judicial review. And that is also plainly clear from the case law. So the fact that post-hearing -- I mean, here in this case, Mr. Hawkins has asserted facial and as-applied. So post-hearing of the formal charges of the Commission, it goes before the State Supreme Court.

I will try to be brief. I wanted to point out too that there's a suggestion of bias by the State Supreme Court that keeps getting floated. And I have to object. There's no evidence of such a thing. And on behalf of my clients, I would submit that such allegations need to be just rejected.

In terms of abstention, to the extent that you look at bias as an exception to the *Younger* abstention, that's a tough road to try to argue. The one case that I know where the Supreme Court has found such bias so that to make the abstention not apply, it was not in a legal disciplinary proceeding case, not one that goes before a state Supreme Court like here. It was a board of optometrists in *Gibson v. Berryhill*, where the board of optometrists who were all in private practice, who were in charge of revoking the licenses of other optometrists, basically they all had a financial

stake in the outcome of those proceedings. And in that case from long ago, the U.S. Supreme Court said that perhaps there's a bias here.

I also wanted to finally address the issue of delay. I have already -- we have already set out in the briefs that the term "embryonic stage" is misapplied here. It is a set of cases that apply or were decided only when the state court action was filed after the federal court action. In fact, the embryonic stage cases and the ones that followed *Doran* and *Miranda v. Hicks*, this issue is a way to actually still apply to *Younger* abstention.

What they said is, all right, so you file your state proceeding and it's pending and in the federal court action, okay, fine, first test met. But in the case where perhaps a federal action is filed first, they will still apply the *Younger* abstention as long as the state court action has been subsequently filed before it's outside of embryonic stage. So I would say, again, that is just misapplication of that case.

And I also will say finally that Rule 12(c) contemplates a motion to dismiss, motion for judgment on the pleadings, just like the one we have here. This case was filed on May 4th. We filed our motion to dismiss. And under Rule 12(c), well, as I'm sure the attorneys here and everyone else is aware, sometimes you have to research the case law,

look at the facts, so you are not prepared to write a rule or file a Rule 12(b)(6) immediately, so you answer. And in our case, we were working in the underlying proceedings trying to resolve that case. We took some actions. We dismissed something. We temporarily withdrew without prejudice so that we could avoid a hearing, again, towards moving -- finding a resolution on the underlying state matter. But when it became clear that there was no resolution, and based on our research, development of the facts, it became obvious to us that we needed to move. So we did.

Rule 12(c) contemplates that you can rule -- move for judgment on the pleadings after you answer as long as you are not doing it in a way that delays trial. And we are not there today. So with that, I'm finished. Thank you.

THE COURT: Thank you all.

MR. DODSON: Thank you, Your Honor.

THE COURT: All right. We will get you an order. Great to see everyone.

(Whereupon, proceedings are adjourned.)

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter, Certified Realtime Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate and complete Transcript of Record of the proceedings.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter